United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-1131

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BJS

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UNITED STATES OF AMERICA, :

Appellee, : Docket No. 76-1131
Docket No. 76-1160

-against- :

JAMES SEELEY CYPHERS, and :
JAMES W. FERRO,

Defendant-Appellants. :

- x

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

PETITION OF JAMES Seeley Cyphers
For Rehearing and Suggestion
for Rehearing IN BANC

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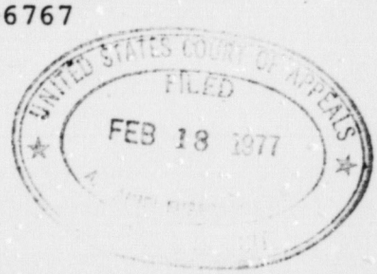

OF COUNSEL

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA, :

Appellee, : Docket No. 76-1131
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-against- :

JAMES SEELEY CYPHERS, and :
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

PETITION OF APPELLANT

PRELIMINARY STATEMENT

James Seeley Cyphers ("Cyphers") petitions pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, for a rehearing of his appeal to the United States Court of Appeals for the Second Circuit from a judgment of conviction entered on March 5, 1976 in the United States District Court for the Eastern District of New York (The Honorable Thomas C. Platt).*

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*The judgment was affirmed on the merits but remanded for consideration as to whether Cyphers' right to a speedy trial was violated. No further proceedings have thus far been instituted in the District Court.

STATEMENT OF THE CASE

The appellant, James Seeley Cyphers, along with his co-appellant, James Ferro, was tried before the Honorable Thomas C. Platt, United States District Judge, and a jury, in the United States District Court for the Eastern District of New York and, on March 5, 1976, convicted on three counts of mail fraud. In the aggregate, Cyphers was sentenced to two terms of imprisonment of five years each, to run concurrently, and probation for five years to be served consecutively to the sentences imposed under the other counts; and to pay a fine amounting to $3,000.

A notice of appeal was duly filed which appeal was subsequently perfected. Therein, Cyphers raised six issues, three of which are raised for rehearing here:*

(a) The government failed to prove that any of the mailings it alleged were done in furtherance of a fraudulent scheme.

(b) The government failed to prove that the tickets that Cyphers allegedly caused to be mailed were themselves fraudulently obtained so as to constitute a violation of 18 U.S.C. 1341, the federal mail fraud statute.

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*With the exception of the question as to whether Cyphers was denied his right to a speedy trial, it is respectfully submitted that the Court erred in regard to Cyphers' other assignments of errors. Cyphers reserves the right to raise these issues if Supreme Court review is ultimately sought.

(c) The government failed to prove that a mailing was foreseeable by Cyphers or that Cyphers caused the mails to be used.

Argument on this appeal was heard on October 18, 1976 and the judgment of conviction was affirmed on February 8, 1977 in an opinion by a panel comprised of Judges Smith, Oakes and Timbers.*

ARGUMENT

The decision of the panel in this case is incorrect. It is respectfully submitted that in rejecting Cyphers' assignments of errors as described above, the panel overlooked or misapprehended the significance of the Supreme Court's decision in United States v. Maze, 414 U.S. 395 (1974); the decisions of other panels of this Court; and generally accepted principles of jurisprudence applicable in this and other courts of appeal. Consequently, a rehearing is warranted, and a rehearing in Banc is appropriate pursuant to Fed. R. App. Pro. 35(a).

(a) Failure to Prove Use of the Mails in Furtherance of a Fraudulent Scheme

In pertinent part, the panel stated that

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*A copy of this opinion is annexed hereto as Exhibit A.

> "The essence of the government's case was that Cyphers . . . had a scheme for fraudulently obtaining airline tickets by using lost or altered credit cards. . . ."
> (Slip. Op. at 2)

There was no contention at trial that Cyphers used the mails to obtain the airline tickets; and the undisputed record at trial shows that as to each transaction forming the basis for the indictments, if Cyphers sold these tickets at all, payment to him was made in advance, before any mailing took place (Tr. 197-98; 244; 248; 256).

In Maze, supra, Mr. Justice Rehnquist for the Court held:

> "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead it required that the use of the mails be for the purpose of executing such scheme or artifice. . . ." 414 U.S. at 405

It is respectfully submitted that where, as here, the mailing took place after both the alleged fraud, as defined by the panel, and the alleged disposition of the fruits of the fraud for a profit, such use of the mails was, prima facie merely incidental to the scheme and not for the purpose of executing it.

The panel, however, held

> "The jury could also find that the fraudulent scheme depended on repeat business from satisfied customers . . . and that the delivery of the tickets was an essential part of the scheme." (Slip. Op. at 6)

If the jury convicted on this theory, then Cyphers was convicted for a crime for which he was not charged. The indictments allege, in substance, that:

(a) Cyphers fraudulently obtained tickets, and as part of that fraudulent plan,

(b) Mailed those tickets to a named purchaser.

However, from the panel's decision it appears Cyphers was found guilty of

(a) Mailing fraudulently obtained tickets as part of a fraudulent plan

(b) To attract customers for a future sale.

This charge was never levelled against Cyphers. No proof that there were subsequent sales traceable to an earlier mailing was offered; and it is apparent that to support a conviction under 18 U.S.C. 1341 a connection between the mailing and the fraud must be proven. United States v. Bolles, 528 F.2d 1190 (4th Cir. 1975); McClendon v. United States, 2 F.2d 660 (6th Cir. 1924). Moreover, this change in theory raises serious questions as to whether requisite criminal intent was also proven.

Accordingly, the panel's affirmation on this point is either inconsistent with Maze, supra, or predicates guilt on a legal theory never alleged or proven by the government. In either instance, reconsideration is required.

(b) Failure to Prove Fraudulent Acquisition

The first indictment under which Cyphers was accused -- 74 Cr. 322 -- charges that

> "On or about the 3rd day of February 1973 the defendant . . . for the purpose of executing the aforesaid scheme . . . caused to be placed in an authorized depository for mail matter a letter . . . which letter contained airline tickets fraudulently obtained."*

However, as to the specific airline tickets described in 74 Cr. 322, there is no evidence -- no evidence whatsoever -- in the record as to how they were obtained. For all that appears, Cyphers purchased these tickets with cash. If he did so, it follows that his mailing the tickets would not constitute mail fraud as charged in 74 Cr. 322. Were it otherwise, any letter Cyphers mailed -- a get well card to his wife, for example -- could be used by the government as the basis for the prosecution, as it could claim proof of both an overall fraudulent scheme and a mailing.

The panel stated there was no direct proof regarding the acquisition of the tickets, but held that the jury could infer Cypher's scheme to defraud included their fraudulent acquisition from the proof of his other wrongful acts, e.g. credit cards and false identification found in his home; and signatures on credit card slips unrelated to the tickets charged in the indictments. (Slip. Op. at 6)

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*74 Cr. 322 Count One, ¶5 (emphasis supplied). Count Two contains a similar charge as to a mailing on February 19, 1973.

However, it is a well established rule of law that other wrongful acts cannot be considered by the jury unless and until the jury finds beyond a reasonable doubt from the other evidence in the case that the defendant performed the particular acts charged in the indictment. DeVitt & Blackmar Federal Jury Practice & Instructions §§ 1307-1308 (1970); see e.g. United States v. McClain, 440 F.2d 241 (D.C. Cir. 1971); Tarvestead v. United States, 418 F.2d 1043, 1046 (8th Cir. 1969), cert. denied, 397 U.S. 935 (1970); United States v. Interstate Engineering Corp., 288 F. Supp. 402, 413 (D. N.H. 1967), aff'd, 400 F.2d 58 (1st Cir. 1968), cert. denied, 393 U.S. 1036 (1969). Indeed, the trial court even charged the jury to this effect. (Tr. 552-53). As stated, there was no other evidence in the record to show the defendants performed the particular act charged, i.e. fraudulent acquisition.

As the panel apparently has seen fit to abrogate this long established rule, it is respectfully suggested that an in Banc rehearing is justified to review this decision.

(c) Failure to Prove That Use of the Mails Was Foreseeable

If the government cannot prove that the defendant himself placed or caused to be placed in the mails a letter related to the fraud, it must show that by the nature of the

defendants' fraudulent activities the use of the mails was reasonably foreseeable. Pereira v. United States, 347 U.S. 1, 8-9 (1954); United States v. Finklestein, 526 F.2d 517 (2d Cir. 1975), cert. denied, U.S. (1976). Here there was no proof as to who mailed the tickets; and all of the tickets involved were apparently purchased in New York, delivered to individuals residing in New York, for flights leaving from New York. Thus, it was hardly foreseeable from the nature of the defendant's conduct that mailing would be a foreseeable part of the consummation of the scheme.

The government's case was based on proof of other wrongful acts,* specifically, Cyphers' allegedly acquiring other tickets for flights leaving from cities different from the city of acquisition. The panel held that mailing was, therefore, foreseeable because

> "While Cyphers . . . might have delivered the tickets [charged in the indictment] in person, they were mailed and the jury could find that these mailings were part of the general scheme to mail airline tickets to people in New York, Chicago, Cleveland and Los Angeles." (Slip. Op. at 6)

While the conclusion sounds reasonable at first blush, the following elements must be considered:

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*The jury apparently convicted Cyphers not on the evidence of guilt as charged but rather because the vast amount of evidence of other wrongful acts introduced against him led to the conclusion that he was a "bad man" who should be convicted for that reason alone.

1. The government introduced no direct proof that Cyphers (or Ferro) mailed the tickets.

2. Although the government introduced evidence that airline tickets to Chicago, Cleveland and Los Angeles were acquired in cities other than that of departure, Cyphers was not charged with mail fraud in connection with those tickets. The logical conclusion is that the government had no proof that these tickets for flights to Chicago, Cleveland and Los Angeles were, in fact, mailed.

Thus, the panel sustained the case against Cyphers solely on the basis of the most remote and speculative circumstantial evidence, saying, in effect, that one may infer because Cyphers purchased a ticket in New York for a flight leaving from Chicago that he mailed that ticket; and from that inference one can further infer that Cyphers would and did mail a ticket acquired in New York for a flight leaving from New York. Such a double inference should not be permitted as the sole basis for sustaining a burden of proof beyond a reasonable doubt.

The only other relevant fact in the record is that three tickets acquired in New York for a flight leaving in New York were mailed, by a person unknown, in New York. However, as the record shows, Cyphers was originally indicted (73 Cr. 848) for 43 counts of mail fraud relating to 43 separate fraudulent acquisitions Cyphers allegedly made by credit card. On

April 5, 1974 that indictment was dismissed because under the ruling in United States v. Maze, supra, the offenses therein charged did not constitute a using of the mails.

Consequently, if the government has proven any scheme at all on Cyphers part, it has proven a scheme where the non-use of the mails was the essential element. Though the panel was correct that the jury could find mails were in fact used, there is no evidence in the record as to who used them and by the nature of the scheme proven by the government it was hardly foreseeable that the mails would ever be used. As a result, the panel misapplied the law as set forth in Pereira, supra, and Finklestein, supra, in regard to the foreseeability of use of the mails.

CONCLUSION

Appellant's petition for a rehearing of his appeal or for a rehearing in Banc should be granted.

Respectfully submitted,

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OF COUNSEL

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 328, 329 - September Term, 1976

(Argued October 18, 1976 Decided February 8, 1977)

Docket Nos. 76-1131, 76-1160

UNITED STATES OF AMERICA,
Appellee,

v.

JAMES SEELEY CYPHERS and
JAMES W. FERRO,
Appellants.

Before: SMITH, OAKES and TIMBERS, Circuit Judges.

Appeal by James Cyphers and James Ferro from judgments of conviction on three counts of violating 18 U.S.C. § 1341 (mail fraud), after a jury trial in the United States District Court for the Eastern District of New York, Thomas C. Platt, Jr., Judge. Reversed as to appellant Ferro on two counts because of violation of Interstate Agreement on Detainers. Remanded for consideration as to both appellants on all counts on whether their right to a speedy trial was violated.

JONATHAN SILBERMAN (William J. Gallagher, The Legal Aid Society, Federal Defender Services Unit, New York, N.Y.), for Appellant Ferro.

THOMAS W. EVANS, New York, N.Y. (P. Jay Wilker and Lance Gotthoffer, New York, N.Y., of counsel), for Appellant Cyphers.

DOUGLAS J. KRAMER, Asst. U.S. Attorney (David G. Trager, U.S. Attorney for the Eastern District of New York, Bernard J. Fried, Asst. U.S. Attorney, of counsel), for Appellee.

Ex. A

SMITH, Circuit Judge:

This is an appeal by James Cyphers and James Ferro from judgments of conviction on three counts, based on two indictments, of violating 18 U.S.C. § 1341 (mail fraud) after a jury trial in the United States District Court for the Eastern District of New York, Thomas C. Platt, Jr., Judge. Both Cyphers and Ferro claim that the evidence was not sufficient to establish any violation of § 1341 and that they were denied their right to a speedy trial. Cyphers also claims that Judge Platt erred in admitting certain evidence and in denying his request that he be allowed to make the argument to the jury. Ferro also claims that his trial violates the Interstate Agreement on Detainers. We reverse on two counts as to Ferro's claim involving the Interstate Agreement on Detainers. We find some possible merit in the speedy trial claim on all counts and therefore remand for further consideration. We find no merit in the other claims.

I.

Cyphers and Ferro were found guilty by a jury on three counts of using the mail to defraud airline companies by means of altered credit cards and identifications, in violation of 18 U.S.C. § 1341.[1/] The essence of the government's case was that Cyphers and Ferro had a scheme for fraudulently obtaining airline tickets by using lost or altered credit cards and that they mailed airline tickets so obtained to Dr. I. Simon on or about February 3, 1973 and on or about February 26, 1973 and to Dr. Stuart Sylvan on or about February 19, 1973.

Relying on United States v. Maze, 414 U.S. 395 (1974), Cyphers and Ferro claim that the evidence was insufficient to establish any violation of § 1341. In Maze the only mailings

were of credit invoices by motel employees, and the Supreme Court held that Maze's use of one Meredith's credit card to obtain goods and services at motels did not constitute a violation of § 1341, since Maze "probably would have preferred to have the [credit] invoices misplaced by the various motel personnel and never mailed at all." Id., at 402. Cyphers and Ferro claim there was no violation of § 1341 because in each case they had purchased the ticket and received payment from either Dr. Simon or Dr. Sylvan prior to mailing the ticket, and so "the mailing here bore no relation to appellants' acquisition of the fruits of their fraud" (Brief of Appellant Ferro at 20); "any fraudulent scheme would have been no less successfully consummated had the airline tickets never been delivered" (Brief for Appellant Cyphers at 25). Cyphers and Ferro also claim that there was no evidence showing that either the tickets received by Dr. Simon on February 3 or the tickets received by Dr. Sylvan were fraudulently purchased by appellants.

In United States v. Finkelstein, 526 F.2d 517, 526-27 (2d Cir. 1975), cert. denied, U.S. (1976), we set out the elements involved in a violation of § 1341: "sufficient evidence in the record to permit a jury to infer beyond a reasonable doubt that a scheme or artifice to defraud existed, that the participants in the scheme caused the mails to be used in furtherance of that scheme, and that the defendant was a participant in the fraudulent scheme. . . . [I]rrelevant is the fact that he [the defendant] did not personally mail the count letter or directly involve himself in the transaction. . . . It is enough that he participated in the scheme and that it was foreseeable that the scheme would involve use of the mails."

Construing the evidence in the light most favorable to the government, United States v. Barash, 412 F.2d 26, 31 (2d Cir.), cert. denied, 396 U.S. 832 (1969), we hold that the evidence was sufficient to show that both Cyphers and Ferro committed three violations of § B41.

Dr. Simon, a dentist, testified that he frequently traveled to Florida from Long Island and was told by George Nagin, a friend, that airline tickets for Florida could be obtained at a discount. Dr. Simon called Nagin and had him order round-trip tickets for a February 8, 1973 flight from John F. Kennedy Airport ("JFK") to West Palm Beach. After he paid Nagin, Dr. Simon received the tickets in the mail on or about February 3, 1973. This transaction was the basis of Count I of indictment 74 CR 322. Again in February, 1973 Dr. Simon needed tickets to Florida; since Nagin was in Florida, Dr. Simon went to Nagin's Manhattan office to pick up the tickets ordered through Nagin's business associate. At Nagin's office Dr. Simon met a man who gave him the tickets he had ordered; at the same time Dr. Simon ordered tickets for his partner, Dr. Sylvan. Dr. Sylvan testified that he received these tickets in the mail on or about February 14, 1973; this transaction was the basis of Count II of indictment 74 CR 322. At the end of February, 1973 Dr. Simon again purchased airline tickets through Nagin for a flight between JFK and Florida, and he received these tickets through the mail. This transaction was the basis of Count I of indictment 75 CR 259.

George Nagin testified that he had been told by Cyphers about the availability of cheap airline tickets and that he had purchased tickets from Cyphers, at a discount, for his own use. Nagin also testified that either Cyphers or Ferro, Cyphers' nephew, picked up the money when Dr. Simon had ordered tickets.

Cyphers had given Nagin a telephone number, 832-1211, in order that he could be reached for orders, and Nagin had given this number to Dr. Simon. This telephone number was proven to have been installed, together with an answering device, in Cyphers' apartment.

On March 19, 1973 an arrest warrant for Cyphers and Ferro was issued pursuant to a complaint of a Postal Inspector, and the [illegible]rant was executed against Cyphers and Ferro at Cyphers' apartment on March 20, 1973. Consent to search the apartment was obtained from Cyphers, and various drivers' licenses, credit cards, a credit card validator, and various credit card company bulletins reporting stolen credit cards were found in Cyphers' briefcase and in his apartment.

One of the seized credit cards bore the name of Richard Redstrom. Richard Rooney, manager of commercial credit for United Airlines, testified that a credit card bearing the account number found on the Redstrom credit card was issued by United Airlines to Richard Hedstrom and that the credit card had been altered to read Richard Redstrom. Richard Hedstrom testified he lost his credit card on February 23, 1973. Rooney testified that numerous airline tickets had been purchased on February 26, 1973 at Boston on the Hedstrom/Redstrom credit card and that the airline had received no payment for these tickets. The signatures on the Hedstrom/Redstrom charge slips were identified as Ferro's. The airline tickets purchased on February 26 included the one received by Dr. Simon at the end of February and others for flights leaving from Newark, Chicago, Cleveland, and Los Angeles.

It was stipulated that a Fred Preston Staff credit card had been reported lost and that three airline ticket charge slips were incurred with the use of the credit card after its reported loss. There was evidence from which the jury could

believe that Cyphers had signed these airline ticket charge slips. One of these charge slips involved an airline ticket purchased in Newark for a flight scheduled to depart from Los Angeles.

While there is no direct evidence that either Cyphers or Ferro purchased either the tickets received by Dr. Simon on February 3 or the tickets received by Dr. Sylvan, the jury could find from the evidence summarized above and other evidence (including two other lost credit cards that were found in Cyphers' briefcase on March 20 and had been altered and used by Ferro to purchase airline tickets that were not paid for)[2/] that Cyphers and Ferro had a scheme that included the fraudulent purchase of Dr. Simon's February 3 tickets and Dr. Sylvan's tickets.

While Cyphers and Ferro might have delivered the tickets to Dr. Simon and Dr. Sylvan in person, they were mailed and the jury could find that these mailings were part of the general scheme to mail airline tickets to people in New York, Chicago, Cleveland, and Los Angeles. The jury could also find that the fraudulent scheme depended on repeat business from satisfied customers of Cyphers and Ferro and that the delivery of the tickets was an essential part of the scheme. Under the standards set out in Finkelstein the evidence was sufficient to support the conviction of both Cyphers and Ferro on all three counts.

II.

Cyphers was represented by an attorney during the trial. Relying on Faretta v. California, 422 U.S. 806 (1975), and Herring v. New York, 422 U.S. 853 (1975), Cyphers claims he has a sixth amendment right to make his own summation.

This reliance is misplaced. Herring does say that "a defendant who has exercised the right to conduct his own defense has, of course, the same right to make a closing argument." 422 U.S. 864, n. 18. But neither Faretta nor Herring deals with a defendant who is represented by counsel and wishes to participate as co-counsel. In United States v. Wolfish, 525 F.2d 457, 462-63 (2d Cir. 1975) (per curiam), cert. denied, 423 U.S. 1059 (1976), which was decided after Faretta and Herring, we held that a defendant who is represented by counsel has no sixth amendment right to participate as co-counsel. We reaffirm that holding.

III.

On July 19, 1973 Ferro, who was on bail, surrendered to Ohio authorities to begin serving his prison term for a previous unrelated offense. On September 20, 1973 a writ of habeas corpus ad prosequendum was served, and on October 12, 1973 he appeared in the United States District Court for the Eastern District of New York and entered a plea of not guilty. He was then returned to the custody of Ohio authorities. On November 12, 1973 the United States lodged a detainer in Ohio against Ferro, and on January 25, 1974 the government served another writ of habeas corpus ad prosequendum. In the spring of 1974 Ferro appeared several times in the United States District Court for the Eastern District of New York, and on June 26, 1974 Judge Travia ordered Ferro "to be returned from whence he came." The records of the Bureau of Prisons indicate that he was returned to Ohio State Reformatory, Mansfield, Ohio. He was tried in January, 1976.

Ferro claims that his 1974 transfer to Ohio violates Article IV(e) of the Interstate Agreement on Detainers ("the Agreement"), 18 U.S.C.A. Appendix. Ferro first raised this claim in a

supplemental brief filed with this court in October, 1976, and the government argues that his failure to raise this claim prior to trial constitutes a waiver under Rule 12(f) of the Federal Rules of Criminal Procedure.

While the policies underlying Rule 12(f) are helpful guides, they are not determinate in construing a statute. Article III of the Agreement provides that the defendant shall be brought to trial within 180 days after the detainer has been lodged provided that he makes a written request to that effect. Article IV(e), on the other hand, makes no reference to a request by the prisoner and says "if trial is not had on any indictment . . . prior to the prisoner's being returned to the original place of imprisonment . . . such indictment . . . shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." In other words, if a state in which a prisoner is charged does not take the initiative to bring a prisoner back for trial the prisoner may require it to do so rather than suffer indefinitely the effects of the detainer on his imprisonment in the state of his incarceration. If a state does take the initiative and bring him from the state of imprisonment to the accusing state it must complete the prosecution before returning him. The main purpose of the Act is to provide means for expeditious resolution of all outstanding charges which may affect the conditions or duration of imprisonment and treatment. Article I of the Agreement says that one "purpose of this agreement [is] to encourage the expeditious and orderly disposition of such charges. . . ." Bringing Ferro from Ohio to New York in January, 1974, returning him to Ohio in the summer of 1974, and then again bringing him to New York for trial in New York in January, 1976, is not an "orderly disposition" of his federal case and violates Article IV(e).

Article IX of the Agreement says "[t]his agreement shall be liberally construed so as to effectuate its purposes." While the government initially argued on appeal (Supplemental Brief at 3, n. 2) that there was nothing in the record indicating that a detainer had been lodged against Ferro, the record now before us indicates that a detainer was lodged against Ferro. There is no showing that Ferro knew, prior to trial, that the detainer had been lodged against him. In such a situation we hold that Ferro may invoke Article IV(e) for the first time on appeal to this court.

We therefore order indictment 74 CR 322, which was filed on April 23, 1974, dismissed with prejudice as to Ferro. United States v. Mauro, ____ F.2d ____, slip op. 265 (2d Cir. Oct. 26, 1976). Indictment 75 CR 259 involving a separate transaction was filed on April 1, 1975 after Ferro had been returned to Ohio. Prosecution under it did not violate the Agreement and it will not be dismissed.

IV.

Based on a complaint by Postal Inspector Robert McDowall, an arrest warrant was issued for Cyphers and Ferro on March 19, 1973 and tney were both arrested on March 20, 1973. On September 18, 1973 a 43-count indictment, 73 CR 848, was filed against Cyphers and Ferro; 40 counts involved the mailing of credit invoices and three counts (counts 20, 21 and 22) involved the mailing of airline tickets to individual purchasers. On September 19, 1973 a notice of readiness was filed. Cyphers entered a plea of not guilty on September 20, 1973, and Ferro entered a plea of not guilty on October 12, 1973.

Following the Supreme Court's decision in Maze in January, 1974, appellants moved on February 19, 1974 to dismiss the

original indictment. The motion was granted on April 5, 1974, and on April 23, 1974 a new indictment, 74 CR 322, was filed, charging Cyphers and Ferro with two counts of mailing of airline tickets. Count I of 74 CR 322 was derived from Count 20 of the original indictment. The government filed its new notice of readiness on May 13, 1974.

On April 1, 1975 the government filed another indictment, 75 CR 259, charging Cyphers and Ferro with one count of mailing an airline ticket. The government filed its notice of readiness on this indictment on June 6, 1975.

Trial on indictments 74 CR 322 and 75 CR 259 began on January 5, 1976. Cyphers and Ferro claim that the long delay between their arrest and the government's readiness for trial violates Rule 4 of the Eastern District Plan for the Prompt Disposition of Criminal Cases ("the Plan"). Ferro also claims that the 33-month delay between his arrest and the trial violates his sixth amendment right to a speedy trial.

In Barker v. Wingo, 407 U.S. 514 (1972), the Supreme Court set forth some of the factors the Court should consider in deciding whether a defendant's sixth amendment right to a speedy trial has been violated: "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Id. at 530.

In Barker the delay was over five years; here it was less than three years. Part of the delay is attributable to the illness of a key government witness (Dr. Sylvan), the change in legal theory necessitated by the Supreme Court's decision in Maze, and a shift in defense counsel. On April 9, 1975 Ferro moved to dismiss the indictments on the ground that his sixth amendment right was violated. Ferro does not claim that the delay prejudiced his defense. He claims (Brief for Appellant

Ferro at 31-32) that he was prejudiced because his incarceration in New York during the spring of 1974 prevented a timely consideration of his parole by Ohio authorities and interfered with the rehabilitative possibilities of being incarcerated in Ohio; he also claims he was prejudiced by not being able to receive a federal sentence partly concurrent with his Ohio sentence. These types of prejudice, to the extent they are included in the holding of Barker, are less serious than the prejudice of an impaired defense. Barker v. Wingo, 407 U.S. at 532. Engaging "in a difficult and sensitive balancing process," Barker, 407 U.S. 533, we hold that Ferro's sixth amendment right to a speedy trial was not violated.[3/]

Rule 4 of the Plan provides that "in all cases the government must be ready for trial within six months from the date of the arrest . . . or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest."[4/] Rule 5 of the Plan gives various provisions for tolling the six-month period.[5/]

On December 18, 1974 Judge Platt denied appellants' motion to dismiss indictment 74 CR 322, and on April 18, 1975 he denied their motion to dismiss indictment 75 CR 259. In his first ruling he relied on Postal Inspector McDowall's affidavit that the investigation and preparation of this complex case extended beyond the date on which appellants were arrested, and Judge Platt ruled that Rule 5(c)(ii) of the Plan therefore tolled the six-month period. Judge Platt did not, however, make a finding as to when the government's investigation and preparation of the case was completed. Judge Platt's April 18, 1975 ruling does not fully articulate his reasons for denying appellants' motion.

For purposes of computing the six-month period of Rule 4 of the Plan, the time begins when Ferro and Cyphers were arrested on March 20, 1973. In this case the period initially stops when the government filed its notice of readiness on September 19, 1973.[6/] Since Ferro was continuously incarcerated in New York and Cyphers was continuously on bail, the six-month period resumes when indictment 73 CR 848 was dismissed on April 5, 1974 and ends (1) on indictment 74 CR 322 when the government filed its notice of readiness on May 13, 1974 and (2) on indictment 75 CR 259 when the government filed its notice of readiness on June 6, 1975. Without taking account of any of the tolling provisions of the Plan, the period under Rule 4 of the Plan is, therefore, 7 months and 7 days for indictment 74 CR 322[7/] and 20 months for indictment 75 CR 259.[8/] We therefore remand for determination as to whether any of the tolling provisions of the Plan are applicable. United States v. Flores, 501 F.2d 1356 (2d Cir. 1974) (per curiam).[9/]

Reversed and dismissed with prejudice as to indictment 74 CR 322 as to Ferro and remanded for further consideration in light of this opinion.

Footnotes

1/ 18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

2/ This evidence was properly admitted during the government's case in chief, since it was not introduced solely to show the defendants' criminal character and its probative worth on the existence of the fraudulent scheme outweighed its potential prejudice. United States v. Grady, ____ F.2d ____, ____, slip op. 291, 302 (2d Cir., Oct. 27, 1976); United States v. Torres, 519 F.2d 723, 727 (2d Cir.), cert. denied, 423 U.S. 1019 (1975).

3/ But cf. United States v. Vispi, ____ F.2d ____, slip op. 513 (2d Cir., Nov. 15, 1976) (20-month delay violates sixth amendment).

4/ The full text of Rule 4 of the Plan is printed at United States v. Flores, 501 F.2d 1356, 1358 n. 1 (2d Cir. 1974).

5/ The full text of Rule 5 of the Plan is printed at Flores, 501 F.2d 1359 n. 2.

6/ Normally the period would end when the government filed its notice of readiness after the defendants had entered their pleas of not guilty. United States v. Bowman, 493 F.2d 594, 597 (2d Cir. 1974). But in this case the defendants' pleas were entered within a reasonable time of the government's filing of its notice of readiness and before our decision in Bowman.

7/ March 20, 1973-September 19, 1973: 5 months, 29 days
April 5, 1974 -May 13, 1974: 1 month, 8 days
Total time: 7 months, 7 days

8/ March 20, 1973-September 19, 1973: 5 months, 29 days
April 5, 1974 -June 6, 1975: 14 months, 1 day
Total time: 20 months

9/ Assuming, arguendo, that the district court, after the hearing, dismisses indictment 75 CR 259 with prejudice as to both Cyphers and Ferro and does not dismiss indictment 74 CR 322 as to Cyphers, a new trial would be unnecessary for Cyphers. The evidence concerning the transaction which forms the basis of indictment 75 CR 259 and the evidence dealing with Ferro's participation in the scheme were admissible as to Cyphers on indictment 74 CR 322 (see fn. 2, supra).

U.S.A. v. Cyphers and Ferro

76-1131, 76-1160

U.S.A. v. Cyphers and Ferro

76-1131, 76-1160

United States Court of Appeals

FOR THE

SECOND CIRCUIT

United States of America,
Appellee,

v.

James Seeley Cyphers and
James W. Ferro,
Appellants.

Nos. 76-1131, 76-1160

OPINION

J. JOSEPH SMITH, C. J.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICE BY MAIL

LANCE GOTTHOFFER, being duly sworn, deposes and says:

1. I am employed as an attorney by the firm of Mudge Rose Guthrie & Alexander, the attorneys for defendant-appellant James Seeley Cyphers in the above entitled action; I am over the age of 21 years and am not a party to the above entitled action.

2. On the 18th day of February, 1977, I served two true copies of the within Petition by depositing true copies of same enclosed in postpaid properly addressed wrappers, in an official mail depository at 20 Broad Street, New York, New York upon:

WILLIAM J. GALLAGHER, ESQ.
The Legal Aid Society
Federal Defender Services Unit
Federal Court House
Foley Square
New York, New York
Attn: Jonathan Silberman, Esq.

DAVID G. TRAGER, ESQ.
U. S. Attorney for the Eastern
District of New York
225 Cadman Plaza East
Brooklyn, New York
Attn: Douglas J. Kramer, Esq.
Asst. U. S. Attorney

Lance Gotthoffer
LANCE GOTTHOFFER

Sworn to before me this
18th day of February 1977

Sharon K Ford
Notary Public

SHARON K. FORD
Notary Public, State of New York
No. 43-4516308
Qualified in Richmond County
Certificate Filed in New York County
Commission Expires March 30, 1978